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95-1389

No. 96-

Supreme Court, U.S.
FILED
MAR 27 1996
CLERK

In The
Supreme Court of the United States
October Term, 1996

DAVID W. ALLARD, JR., CHAPTER 7 TRUSTEE
OF THE ESTATE OF GEORGE CHOMAKOS
AND NIKKI CHOMAKOS
Petitioner,

v.

FLAMINGO HILTON,
Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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March 19, 1996

15 pp

QUESTION PRESENTED

1. Whether the Court of Appeals erred in affirming the District Court's affirmance of the Bankruptcy Court's finding that the debtors received fair consideration and reasonably equivalent value in exchange for monies transferred to Respondent?

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption. Pursuant to Rule 29.1 of this Court, Respondent states that it is a corporation and that its parent company is Hilton Gaming Corporation.

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Respondent's Brief in Opposition

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BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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Flamingo Hilton ("Respondent"), respectfully prays that this Court deny the Petition for Writ of Certiorari filed by David W. Allard, Jr., Trustee of the Estate of George Chomakos and Nikki Chomakos ("Petitioner").

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OPINIONS BELOW

Petitioner has correctly cited the opinions and judgments delivered in the courts below.

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JURISDICTION

Petitioner has accurately set forth the basis for this Court's jurisdiction.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the statutes cited by Petitioner, this case also involves 11 U.S.C. 548(a)(2), which provides in pertinent part:

> (a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition,

> if the debtor voluntarily or involuntarily - . . .
>
> (2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
>
> (B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

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STATEMENT OF THE CASE

George and Nikki Chomakos (the "debtors") filed a Chapter 11 proceeding on August 2, 1990. The case was subsequently converted to Chapter 7, and Petitioner was appointed trustee. (Petitioner's Appendix 1).

This adversary proceeding arises out of the gambling activities of the debtors at the Flamingo Hilton in Las Vegas. Gambling is a legal and heavily-regulated industry in the State of Nevada and the debtors engaged in lawful gaming transactions at the Flamingo Hilton. (Petitioner's Appendix 7).

Nikki Chomakos gambled at Petitioner's casino on three known occasions prior to the bankruptcy filing - June 15, 1989, June 16, 1989 and September 11, 1989. (Petitioner's Appendix 6). Ms. Chomakos played slot machines, and won a $2000.00 jackpot on June 15, 1989, a $5000.00 jackpot on June 16, 1989 and a $2000.00 jackpot on September 11, 1989. (Petitioner's Appendix 6). Despite documented winnings of $9000.00, Ms. Chomakos claimed she

actually had a net gambling loss of $5000.00 for these three days. (Petitioner's Appendix 6).

Mr. Chomakos lost money at the casino on six separate occasions - $900.00 on July 1, 1987, $100.00 on November 1, 1987, $600.00 on January 4, 1988, $600.00 on June 20, 1988, $1400.00 on June 12, 1989 and $110.00 on April 29, 1990, for a total loss of $3710.00. (Petitioner's Appendix 6 - 7).

Petitioner considered the $8710.00 lost by the debtors to be a fraudulent conveyance, and filed an adversary proceeding seeking to recover these funds pursuant to 11 U.S.C. 548 and M.C.L.A. 566.11 et. seq. (Petitioner's Appendix 5). Following a bench trial, the Bankruptcy Court issued its Opinion. (Petitioner's Appendix 1). The Bankruptcy Court found the debtors were insolvent as of January, 1988 (Petitioner's Appendix 10) and lost $7710.00 gambling at Petitioner's casino after this date. (Petitioner's Appendix 11). However, the Bankruptcy Court found no fraudulent conveyance occurred because the debtors received reasonably equivalent value and fair consideration in exchange for the monies transferred to Petitioner.

The Bankruptcy Court's decision was affirmed by the District Court. (Petitioner's Appendix 26). The District Court's decision was affirmed by the United States Court of Appeals for the Sixth Circuit. (Petitioner's Appendix 27). Petitioner's Petition for Rehearing with

Suggestion for Rehearing En Banc was denied. (Petitioner's Appendix 36).

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REASONS FOR DENYING THE WRIT

1. The Opinion Below Does Not Conflict With Other Decisions.

The Court of Appeals found that placing a bet at a casino where wagering is lawful creates a legally enforceable contract right - the right to receive money in exchange for a winning bet - and that this right constitutes reasonably equivalent value. (Petitioner's Appendix 31; Petitioner's Appendix 33). Petitioner suggests this decision conflicts with those made by other circuits, citing Scholes v. Lehmann, 56 F.3d 750 (7th Cir. 1995); Zahra Spiritual Trust v. United States, 910 F.2d 240 (5th Cir. 1990); and In re Treadwell, 699 F.2d 1050 (11th Cir. 1983).

Scholes held charitable gifts lack reasonably equivalent value, Id., at 759. Zahra held transfers made to a charitable trust were not made for fair consideration, Id., at 249. Treadwell held transfers made for "love and affection" were not made for reasonably equivalent value, Id., at 1051.

The case at bar is plainly distinguishable. In none of the foregoing cases did the debtor receive a contractual right to potentially receive something of value. In the instant case, the debtors received enforceable contract rights having economic value.

Petitioner also cites In re Nahas, 181 B.R. 930 (Bankr. S.D. Ind. 1994), and Hansbury v. Citibank, 128 B.R. 320 (Bankr. D. Mass. 1991). Neither case involved Section 548. Rather, they dealt with nondischargeablility of debts under 11 U.S.C. 523, Id., at 320; Nahas, supra, at 931.

2. The Fact The Debtors Lost Money Is Not Indicative Of An Absence Of Reasonably Equivalent Value Or Fair Consideration.

Petitioner suggests that since the debtors lost money gambling, they received "no economic value in exchange" for their wagers. That the debtors may have lost money on a given wagering transaction or overall is not tantamount to an absence of consideration. As the Court of Appeals correctly noted, the time for determining whether reasonably equivalent value or fair consideration existed is when the debtors placed their wagers. (Petitioner's Appendix 31). [See In re Morris Communications NC, Inc., 914 F.2d 458, 466 (4th Cir. 1990), quoting Collier on Bankruptcy Section 548.09 at p. 116 (15th ed. 1984)]. Reasonably equivalent value and fair consideration in the form of the opportunity to win money existed at the time the debtors wagered. The fact a given wager was ultimately lost does not mean the consideration did not exist in the first place.

Morris Communications aptly demonstrates that reasonably equivalent value can exist in a transaction which may ultimately bear no economic fruit. In that case, the property in question was a 26%

stock interest in a corporation whose sole asset was a cellular telephone license application, Id., at 460. At the time of the transfer, the application had no present value; "it was merely a right to participate along with 21 other applicants in the award of the non-wireline cellular license for the Charlotte-Gastonia SMSA through the 'rolling of the dice' in a lottery", Id., at 468.

According to Petitioner's position, the stock transfer in Morris Communications would be a fraudulent conveyance unless the applicant prevailed in the lottery. However, the Morris Communications court had no doubt that the transfer had value, Id., at 460. As in Morris Communications, there is no doubt the debtors received value in the case at bar.

3. The Court Below Considered The Standpoint Of Creditors.

Citing McCaslin v. Schouten, 294 Mich. 180, 186, 296 N.W. 696 (1940), petitioner states that under Michigan law, the presence or absence of fair consideration must be considered from the standpoint of creditors, and suggests the court below failed to follow this standard in making its decision.

The Court of Appeals did consider the standpoint of creditors.

> Looking at the matter from the standpoint of creditors, as the trustee urges us to do, it seems reasonably clear that the intangible property rights accruing to (the debtors) when they placed their bets differed significantly from the benefits accruing to the donors in the church contribution cases . . .

> A debtor who places a bet in a fair and lawful game of change, on the other hand, may receive hard cash in return. On one of the days when Mrs. Chomakos played Flamingo's slot machines, for example, she had winnings of $5,000. Suppose she had won a $5,000 jackpot at the start of her visit to the casino and had stopped playing as soon as she won; the return on her `investment' would obviously have benefited her creditors. (Petitioner's Appendix 34).

When the court below stated it was not persuaded that it "ought to evaluate the transactions at issue here solely from the standpoint of creditors" (Petitioner's Appendix 35), it was merely noting the absurd results which would follow if it adopted Petitioner's position that the litmus test for a fraudulent conveyance is whether creditors benefit from the transfer. For example, if instead of spending the $7710.00 on gambling, the debtors had spent this sum on expensive dinners, according to Petitioner's position, the restauranteur would be liable for return of the money as a fraudulent conveyance because the meals did not economically benefit the creditors.

From the standpoint of their creditors, the debtors received value. In fact, the debtors' gaming transactions were potentially more economically advantageous than spending money at a restaurant, because spending money at the restaurant does not afford an opportunity to win money.

CONCLUSION

Based on the foregoing, the petition for writ of certiorari should be denied.

Respectfully submitted,

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